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IN THE

Supreme Court of the United States

CELTRONIX TELEMETRY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF URBAN COMM-NORTH CAROLINA, INC., DEBTOR-IN-POSSESSION, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Urban Comm-North Carolina, Inc. ("UC-NC"), is a small, start-up business which was formed, along with several related companies, to acquire broadband Personal Communications Services ("PCS")[2] spectrum licenses to be auctioned by the Federal Communications Commission ("the Commission") and to thereafter build and operate a telecommunications network utilizing such electromagnetic spectrum. It has an interest in this petition because, just as the petitioner, Celtronix Telemetry, Inc. ("Celtronix"), it entered into a commercial lending transaction with the Commission for the purchase of electromagnetic spectrum licenses, subsequently encountered financial difficulties in making installment payments for the licenses through no fault of its own, and thereafter lost (or purportedly lost) its licenses when the Commission took unilateral action in contravention of the rules by which commercial transactions are typically governed.

Specifically, both Celtronix and UC-NC were recipients of spectrum licenses won through two of the earliest spectrum

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1. Both petitioner, Celtronix Telemetry, Inc., and the Solicitor General have consented to the filing of this brief and, in compliance with Supreme Court Rule 37.2, their letters of consent have been lodged with the Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party in this case authored this brief in whole or in part and that no monetary contribution to the preparation or submission of this brief was received from any person or entity other than the *amicus curiae* or its counsel.

2. Broadband PCS makes possible a variety of mobile and portable radio services using such devices as small, lightweight, multifunction portable phones, portable fax machines, and advanced devices with two-way data capabilities that are competing with existing cellular, paging and other land mobile services.

auctions — the second and fifth[3] — ever conducted by the Commission, which was authorized to begin distributing spectrum through a competitive bidding process by Congress only in 1993. Both companies were entitled to finance a portion of their bids through installment payments under the Commission's auction rules designed to encourage small businesses; and both subsequently encountered difficulties in making the required installment payments, Celtronix due to a failure of interactive television technology and UC-NC due to a flooding of the broadband PCS market by the Commission.[4]

In the midst of these financial difficulties, both Celtronix and UC-NC were deprived by the Commission of relief which should have been available to them as participants in commercial transactions and both have now purportedly lost their spectrum licenses. In the Celtronix case the Commission has taken the

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3. Celtronix was awarded Interactive Video and Data Service ("IVDS") licenses in the second auction conducted by the Commission, *see* Petition, p. 3, and UC-NC was awarded C Block PCS licenses in the fifth auction, *see FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' C Block BTA License, Final Down Payment Due by Sept. 24, 1996,* Public Notice, 11 FCC Rcd 11316 (FCC 1996).

4. Other participants in the respective auctions also faced financial difficulties for similar reasons, and the Commission had to suspend temporarily all installment payments for the successful bidders in each of the two auctions. *See* Petition, p. 5; *In re Installment Payments for PCS Licenses*, Order, 12 FCC Rcd 17325 (FCC 1997). In both cases, prior to reinstating installment payments, the Commission provided the successful bidders with only limited options for dealing with the financial difficulties being faced. *See* Petition, p. 5; *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 16436 (FCC 1997).

position that it can unilaterally change the rules affecting grace periods, forcing Celtronix to surrender its licenses under protest. In the case of UC-NC the Commission contends that it has the power to revoke the licenses of PCS companies for failure to make installment payments while in bankruptcy[5] and, in accordance with this line of thinking, has revoked UC-NC's licenses.[6] Thus, one of the relevant issues in the Petition

5. On October 28, 1998, the date on which it was required to make payment to the Commission or suffer a default, UC-NC filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York and thereafter commenced an avoidance action by adversary complaint against the Commission to value the licenses as at the time UC-NC incurred the obligations to the Commission and avoid the difference as a fraudulent conveyance. *See Urban Comm-North Carolina, Inc. v. FCC (In re Urban Comm-North Carolina, Inc.)*, Ch. 11 Case No. 98-B-10086, Adv. No. 99/8125A (Bankr. S.D.N.Y.). UC-NC is still in Chapter 11 protection, and the adversary proceeding is still pending.

6. On October 6, 2000, UC-NC filed a petition for reconsideration of the Commission's announcement that the licenses previously awarded to UC-NC were revoked and were to be re-auctioned. *See In re Application of Urban Comm-North Carolina, Inc. for Reconsideration of Public Notice of C and F Block PCS Spectrum Auction, Petition for Reconsideration* (FCC Oct. 6, 2000) ("the UC-NC Reconsideration Petition"). The Commission has yet to decide the UC-NC Reconsideration Petition. In November 2001, UC-NC filed a petition for writ of mandamus ("the UC-NC Mandamus Petition") with the United States Court of Appeals for the District of Columbia Circuit ("the D.C. Circuit") directing that the Commission act forthwith upon the UC-NC Reconsideration Petition or that the Commission grant the relief requested in the UC-NC Reconsideration Petition. On March 26, 2002, the D.C. Circuit denied the UC-NC Mandamus Petition "without prejudice to renewal after the United States Supreme Court rules in *FCC v. NextWave Personal Communications, Inc.*, No. 01-653, *cert. granted*, 70 U.S.L.W. 3317 (2002)." *See In re Urban Comm-North Carolina, Inc.*, No. 01-1490 (D.C. Cir. Mar. 26, 2002).

affecting UC-NC is the extent to which the Commission, or any other governmental agency, can participate in commercial activity and agreements (here, selling electromagnetic spectrum licenses at their full commercial value and structuring the sales as typical commercial transactions) and thereafter negate any undesirable consequences of this commercial activity by unilateral decree and by claims, true or not, that its actions in doing so are regulatory.

SUMMARY OF ARGUMENT

The D.C. Circuit totally failed to address the implications arising from the commercial nature of the Commission's agreement with Celtronix to finance the purchase of spectrum licenses. The D.C. Circuit found that "the grace period change may have altered the value of the rights Celtronix acquired by its winning bid and commitment to make the required payments." *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001). In response to Celtronix's argument that the rule change amounted to a breach of contract, the D.C. Circuit simply stated that there was "a long tradition of Commission authority to change rules governing already-issued licenses and congressional provision for the application of the prior understandings to licenses acquired by auction." *Id.* at 590. Although that may be true, when the Commission purposely engages in commercial activity, that tradition must yield to the traditions governing such activity.

ARGUMENT

Having purposely crossed over into the commercial financing arena, even beyond any mandate by Congress, the Commission subordinated itself to the contract and other laws that regulate the affairs of parties to commercial

transactions. While Congress, in consonance with prevailing trends towards deregulation and reliance on market forces instead of presumed bureaucratic wisdom, and with a view towards containment of administrative costs and realization of revenue from the national resources,[7] authorized the Commission to allocate radio spectrum licenses by competitive bidding rather than, as in the past, by administrative adjudication or random allocation at no charge to the licensee for the license,[8] Congress did not mandate that the Commission become a party to financing transactions with the successful bidders:

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7. President Clinton proposed in his budget submitted to Congress [for fiscal year 1994] that the FCC be given authority to use competitive bidding as a source of revenues and as a means of improving the spectrum assignment process. . . . In many ways, President Clinton's budget takes a position similar to the Bush and Regan administrations. It has long been the view of NTIA and the FCC that the Commission's current process of spectrum assignment by lottery and comparative hearings is flawed. This view holds that not only do current licensing procedures often result in arbitrary and inefficient spectrum management decisions, but also, by assigning spectrum to non-federal licensees without receiving compensation, the government is failing to manage wisely one of the nations most valuable national resources.

H.R. Rep. No. 103-111 (1993).

8. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387-392 (1993), amending Section 309 of the Communications Act of 1934 (codified in relevant part at 47 U.S.C. § 309(j)).

> [N]othing in the Act required the Commission to choose the licensing scheme at issue here. Although section 309(j) suggests the possibility of using guaranteed installment payments of some kind, the statute also suggests alternative methods of facilitating small business participation. Indeed, in 1998, the Commission decided that "until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses."

NextWave Personal Communications, Inc. v. F.C.C., 254 F.3d 130, 155 (D.C. Cir. 2001), *cert. granted*, 122 S. Ct. 1202 (2002) (citation omitted).

In carrying out its mandate and more — selling licenses at their full commercial value and structuring the sales as typical commercial transactions — the Commission placed itself, in respect of those transactions, on the same plane as other sellers or financiers of goods, services or other things of value. The Commission, by design, adopted the form and substance of an ordinary commercial lending transaction, and the Commission's actions as a commercial lender give rise to the same set of concerns as all other commercial transactions. Among those concerns are the consequences of financial distress experienced by a participant in the process. Put differently, the Commission could not responsibly or reasonably determine that it could serve a regulatory purpose by entering into a full-fledged commercial transaction without also making the determination that it must accept all of the concomitants of a commercial transaction, including being bound by the terms governing the contract (or, as in the case of UC-NC, by the bankruptcy laws).

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be granted, and, upon the appeal, the decision of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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